No. 02-1495

Supreme Court, U.S.
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In The

Supreme Court of the United States

ESTRELLITA G. MIGUEL,

Petitioner,

vs.

THE BANK OF NEW YORK, TRUSTEE, UNDER THE POOLING & SERVICING AGREEMENT SERIES 1995 B; ALLIANCE BANKCORP, a corporation; and COUNTRYWIDE FUNDING CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND SUPREME COURT RULE 29.6 STATEMENT

In addition to the parties listed on the caption of the case in this Court, Respondent, The Bank Of New York, Trustee Under The Pooling And Servicing Agreement Series 1995 B ("BNY"), discloses the following: Independent National Mortgage Corp., doing business as IndyMac (currently known as IndyMac Bank, F.S.B.), The Bank Of New York (not as trustee) and Countrywide Home Loan were originally defendants in the District Court action. All were dismissed by agreement early in the litigation and the Petition does not raise any issues with respect to them.

BNY is controlled by The Bank Of New York which is a publicly traded company on the New York Stock Exchange. No entity owns 10% or more of BNY's stock.

TABLE OF CONTENTS

	Page
PARTIES TO THE PROCEEDING AND SUPREME COURT RULE 29.6 STATEMENT	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF THE CASE	1
I. THE UNDERLYING CREDIT TRANSACTION BETWEEN MIGUEL AND ALLIANCE	1
II. THE DISTRICT COURT PROCEEDINGS	2
III. PROCEEDINGS BEFORE THE NINTH CIRCUIT	4
REASONS FOR DENYING THE PETITION	6
I. MIGUEL'S NEW CLAIM OF SUBJECT MATTER JURISDICTION IS NOW ILLEGITIMATELY PREMISED UPON A CLAIM NEVER PLEADED	8
A. Miguel's Belated – And Still Unpleaded – Damage Claim Cannot Establish Jurisdiction	8
B. Miguel Sought No Amendment, Which Would Have Been Futile In Any Event	9
C. Miguel's Damage Claims Were Waived Since The District Court's Denial of That Claim Was Never Challenged	11
II. THE NINTH CIRCUIT CORRECTLY HELD THAT NEITHER AGENCY PRINCIPLES NOR TILA ALLOW FOR CANCELLATION AGAINST AN ASSIGNEE BY GIVING NOTICE TO A SERVICER	11

TABLE OF CONTENTS – Continued

Page

A. TILA Precludes "Substitute" Notice Upon A Servicer When Rescission Is Sought Against The Assignee 12

B. Miguel Cites No Authority Which Supports The Proposition That A Rescission Notice To The Servicer Can Bind The Assignee 13

III. THE NINTH CIRCUIT WAS NOT BOUND BY "FACTS" ALLEGEDLY FOUND BY THE DISTRICT COURT WHICH WERE UNSUPPORTED BY THE RECORD 15

IV. THIS CASE DOES NOT MEET THIS COURT'S REQUIREMENTS FOR REVIEW.. 16

CONCLUSION 17

APPENDIX A ("Second Amended Complaint; Demand for Truth In Lending Act Rescission").....App. 1

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Beach v. Ocwen Federal Bank, 523 U.S. 410 (1998)..... 5

Castellano v. City of New York, 142 F.3d 58 (2nd Cir. 1998), *cert. denied*, 525 U.S. 820 (1998) 11

Falise v. American Tobacco Co., 241 B.R. 63 (E.D.N.Y. 1999).....10

Greer v. O'Dell, 305 F.3d 1297 (11th Cir. 2002).....13, 14

Kittel v. First Union Mortgage Corporation, 2001 WL 4047942 (W.D. Okla. 2001), *stayed*, 303 F.3d 1193 (10th Cir. 2002).....14

Kokkonen v. Guardian Life Insurance Co. of America, 511 U.S. 375 (1994) 5, 9

Kowal v. MCI Communications Corp., 16 F.3d 1271 (D.C. Cir. 1994)..... 9

Medical Laboratory Mgmt. Consultants v. Am. Broad Cos., 306 F.3d 806 (9th Cir. 2002).....11

Meyers v. Citicorp Mortgage, Inc., 878 F. Supp. 1553 (M.D. Ala. 1995) 13, 14

Morongo Band of Mission Indians v. California State Board of Equalization, 858 F.2d 1376 (9th Cir. 1998).....10

Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826 (1989)..... 9

Stone v. Mehlberg, 728 F. Supp. 1341 (W. D. Mich. 1989).....12

Shepeard v. Quality Siding & Window Factory, Inc., 730 F. Supp. 1295 (D. Del. 1990) 12

TABLE OF AUTHORITIES – Continued

Page

Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988) 16

Whitmire v. Victus Limited T/A Master Design Furniture, 212 F.3d 885 (5th Cir. 2000) 9

FEDERAL STATUTES

15 U.S.C. § 1602(f) 2, 12

15 U.S.C. § 1635 9

15 U.S.C. § 1635(a) 12

15 U.S.C. § 1635(f) 2, 5, 6, 11

15 U.S.C. § 1640 ..... 5, 6

15 U.S.C. § 1640(a) 4

15 U.S.C. § 1640(a)(3) 4

15 U.S.C. § 1640(e) 5, 10

15 U.S.C. § 1641(c) 12, 13

15 U.S.C. § 1641(f) 12, 13, 14

Fed. R. Civ. Proc., Rule 8(a) 9

Fed. R. Civ. Proc., Rule 8(a)(1) 9

Fed. R. Civ. Proc., Rule 15 ..... 5, 10

Fed. R. Civ. Proc., Rule 59(e) 4, 8

OPINIONS BELOW

The decision of the Ninth Circuit Court of Appeals in *Miguel v. The Country Funding Corp.*, Hawaii District Court No. CV-97-01593 is reported at 309 F.3d 1161 (9th Cir. 2002) and is found in the Appendix in the Petition For Writ Of Certiorari (hereafter, "Pet. Appx. at [page]").

Several Hawaii District Court orders are included in Petitioner's Supplemental Appendix (hereafter, "Pet. Supp. Appx. at [page]"): (1) Findings Of Fact And Conclusions Of Law, filed August 17, 2000 (Exhibit I); (2) Judgement In A Civil Action, filed August 22, 2000 (Exhibit II); (3) Order Granting Defendant The Bank Of New York Trustee Under The Pooling And Servicing Agreement Series 1995 B's Motion To Amend Findings Of Fact And Conclusions Of Law and to Amend the Judgment, filed October 5, 2000 (Exhibit III); and (4) Judgment In A Civil Action, filed October 12, 2000 (Exhibit IV).

None of the District Court Orders are reported.

STATEMENT OF THE CASE

I. THE UNDERLYING CREDIT TRANSACTION BETWEEN MIGUEL AND ALLIANCE.

Plaintiff, Appellant and Petitioner, Estrellita G. Miguel ("Miguel") and her husband entered into a credit transaction with Alliance Bank Corp. ("Alliance") on December 1, 1994. Pet. Appx. at p. 6. Defendant, Appellee, Cross-Appellant and Respondent BNY acquired its lien against Miguel on October 17, 1996 by assignment. *Id.* at 6.

On November 7, 1997, (twenty-three days before the running of the three year limitation of 15 U.S.C. § 1635(f)), Miguel sent a certified letter to Countrywide Funding Corporation ("Countrywide") purporting to cancel her loan. Miguel sought rescission and cancellation of her mortgage on the grounds that she received a defective Truth In Lending Act ("TILA") Disclosure Statement from Alliance on December 1, 1994. *Id.* at 5. Countrywide was the servicer of the loan. *Id.* (It was neither the "creditor" under 15 U.S.C. § 1602(f) of TILA, which was Alliance, nor the "assignee" under TILA, which was BNY.) No evidence was adduced below showing that BNY ever received contemporaneous notice of Miguel's purported cancellation. *Id.* at 7.

II. THE DISTRICT COURT PROCEEDINGS.

On December 1, 1997, exactly three years after making the loan with Alliance, Miguel filed suit against Countrywide alone, seeking rescission. *Id.* at 6.

Miguel admitted that she first learned that BNY was the lien holder only on March 19, 1998. On March 26, 1998, Miguel filed a Motion For Leave To File An Amended Complaint which sought to "substitute" BNY in the place of Countrywide. *Id.* at 7.

On April 21, 1998, Miguel filed a Second Motion For Leave To File A Second Amended Complaint. This Motion sought to add additional parties to Miguel's suit, including BNY. There was no evidence below to show that BNY had any notice of these motions or any contemporaneous knowledge of the existence of the lawsuit. *Id.*

On June 17, 1998, Miguel filed her "2nd Amended Complaint; Demand For Truth In Lending Act Rescission"

against, *inter alia*, BNY. Resp. Appx. A. Service was effected on BNY on November 9, 1998. *Id.*

Miguel's Second Amended Complaint sought only rescission against BNY. No facts were pleaded or claim made that BNY, as assignee, had independently violated TILA by, for example, failing to immediately cancel the loan upon Miguel's November 7, 1997 demand to Countrywide. *Id.* at 5, 6; Resp. Appx. A.

On or about June 1, 1999, the District Court heard arguments on a Motion For Summary Judgment by BNY. The District Court, by order filed June 3, 1999, denied BNY's motion and held that Miguel's November 27, 1997 notice of cancellation was effective under TILA where the notice was sent only to the servicer (Countrywide) and not to the assignee (BNY). The District Court also held, "Defendant Bank Of New York admits that it received Plaintiff's Notice within three years of the loan transaction." *Id.*

There is no evidence in the record which supports a finding that BNY, as opposed to Countrywide, "admitted" receiving, or ever received, Plaintiff's notice of cancellation. (Indeed BNY's trial counsel later argued: "There is no testimony proffered before your Honor about notice [of the cancellation] being given to [The] Bank Of New York." The District Court did not disagree: "She [Miguel] said she didn't know anything about it. She said – she testified she didn't know about [The] Bank Of New York." Trial Transcript 60:10-15.)

After trial on August 2, 2000, by Order filed August 17, 2000, the District Court ordered rescission for Miguel, holding: "By sending, via certified mail, a mortgage cancellation notice to the [sic] Alliance Bank Corp.'s assignee,

Defendant BNY, on November 7, 1997, Plaintiff effectively and timely exercised her right to rescind under TILA since she cancelled the transaction prior to December 1, 1997." Pet. Supp. Appx., at 8. The District Court also ordered BNY to pay Miguel's attorneys' fees pursuant to 15 U.S.C. § 1640(a). *Id.* at 9.

BNY challenged the fee award and moved to amend the judgment pursuant to Fed. R. Civ. Proc., Rule 59(e), which on October 5, 2000, the District Court granted. Pet. Supp. Appx. at 11. There, the District Court ordered that BNY was not liable for damages or attorneys' fees, under 15 U.S.C. § 1640(a)(3), because the violations of the original lender were not apparent "on the face" of the disclosure documents and thus "not obvious" to BNY when it assumed the role of assignee. *Id.* at 15.

It was only in response to BNY's post-trial motion on the fees issue that Miguel first asserted, in passing, that BNY directly violated TILA "by failing to properly rescind the security interest after receiving Plaintiff's notice." *Id.* at 15. The District Court rejected this claim on the merits since "Plaintiff never offered to pay the outstanding principal balance [and was therefore] never entitled to immediate rescission and Defendant BNY did not violate TILA itself." *Id.* at 15-16.

Miguel has never sought leave to amend her complaint to assert a damage claim against BNY.

III. PROCEEDINGS BEFORE THE NINTH CIRCUIT.

Miguel appealed, *inter alia*, the denial of fees, although she did *not* argue that the District Court erred by

denying her damage claim for failure to tender. BNY cross-appealed asserting, *inter alia*, that the District Court lacked subject matter jurisdiction over Miguel's rescission claims, given the statute of repose of 15 U.S.C. § 1635(f). Miguel's Ninth Circuit "Reply/Answering Brief" argued the existence of jurisdiction and asserted that BNY was liable to Miguel for *damages* pursuant to 15 U.S.C. § 1640 for failing to immediately rescind pursuant to the demand on Countrywide. Pet. Appx. at p. 10. Miguel's theory was that when BNY failed to rescind on November 7, 1997, the one year limitation of 15 U.S.C. § 1640(e) began to run and that it had not expired by the time she commenced her rescission action against BNY. *Id.*

The Ninth Circuit reversed the District Court's judgment of rescission, holding that there was no subject matter jurisdiction and remanded with an order to dismiss. The Ninth Circuit held, *inter alia*, (1) following *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375, 377 (1994) that "the party asserting federal jurisdiction has the burden of establishing it;" (2) following *Beach v. Ocwen Federal Bank*, 523 U.S. 410 (1998), that the TILA rescission statute of 15 U.S.C. § 1635(f) is a statute of repose rather than a statute of limitation; (3) that "because Miguel did not attempt to rescind against the proper entity within the three year limitation, her right to rescind expired;" and (4) that Miguel failed to file suit against the correct party within the three year limitation period and she could not extend the statute by amending to add a new party outside the three year period (and in any event was not in compliance with the time limitations of Fed. R. Civ. Proc., Rule 15). *Id.* at 8-12.

The Ninth Circuit also short-circuited Miguel's putative damage claim, holding that the cancellation letter she

sent November 7, 1997, to the servicer, Countrywide, was not an effective rescissionary notice to BNY, noting "no authority supports the proposition that notice to Countrywide should suffice for notice to the Bank." Pet. Appx. p. 10. Because there was no effective notice of cancellation within the three year period, the right to cancel was extinguished and demands made after the extinguishment of the right gave rise to no jurisdiction. *Id.* at 11-12.

REASONS FOR DENYING THE PETITION

Miguel does not question the Ninth Circuit's determination that the statute of repose, found at 15 U.S.C. § 1635(f), deprived the court of subject matter jurisdiction of her rescission claims. She also never appealed from – and thus abandoned any objection to – the District Court's determination that her damage claim, based on BNY's failure to rescind, was meritless. However, she now claims the Ninth Circuit erred, asserting that subject matter jurisdiction existed by virtue of her abandoned damage claim. Miguel argues that, (1) she properly rescinded against BNY within the three year statute of repose by serving her November 7, 1997 cancellation notice on the servicer, Alliance; (2) BNY is liable in damages for failing to immediately cancel on November 7, 1997; and (3) the one year statute of limitation of 15 U.S.C. § 1640 extends the three year § 1635(f) statute of repose by one year. Miguel also argues that the Ninth Circuit ignored the District Court's "finding" that BNY had notice of her claim on or about November 7, 1997, and therefore the Ninth Circuit erred in determining that her notice of cancellation was ineffective.

Miguel's Petition should not be granted.

First, Miguel's Petition is flawed on procedural grounds. She concedes, by not challenging, that the Ninth Circuit correctly held her rescission claims barred. Accordingly, now both prongs of her Petition are premised on jurisdiction flowing from damage claims concocted post-trial. Because these are claims which were not made below in any cognizable pleading, Miguel's Petition is an impermissible attempt to bootstrap subject matter jurisdiction upon an entirely new claim. Jurisdiction cannot flow from claims which were not made below nor should this Court grant an amendment she never sought.

Second, the District Court was correct that, on the merits, the damage claim failed. Miguel in any event waived because she failed to appeal the District Court's adverse determination on that claim. Third, the Ninth Circuit was correct that a TILA notice of cancellation, which is not given to the entity against whom rescission is sought, cannot be effective. Fourth, the Ninth Circuit was *not* required to accept District Court "findings" which do not exist and/or which are totally unsupported by the record.

Finally, Miguel cites no apposite authority for the position she espouses. No split in the federal circuits or split between a circuit and a state's highest court exists; nor is there any claim that this is a weighty matter of national importance, justifying the expenditure of this Court's limited resources.

I. MIGUEL'S NEW CLAIM OF SUBJECT MATTER JURISDICTION IS NOW ILLEGITIMATELY PREMISED UPON A CLAIM NEVER PLEADED.

Miguel filed a claim for rescission in District Court on December 1, 1997, the last day of the three year statute of repose for rescission claims. She filed a rescission claim only against the wrong party, Countrywide. She amended, by filing on June 17, 1998, to add new parties, including BNY. As found by the Ninth Circuit – and not challenged in her Petition – her suit against BNY was outside the statute of repose for rescission and the amendment thus constituted an impermissible extension of the district court's subject matter jurisdiction.

After trial on the rescission claim, and only in her opposition to BNY's post trial Fed. R. Civ. Proc., Rule 59(e) motion to amend the judgment, Miguel asserted, for the first time, a *damage* claim – an alleged direct violation of TILA, premised on BNY's failure to immediately rescind upon the November 7, 1997 demand. The District Court denied the belated damage claim on the merits, holding BNY had no obligation to respond to Miguel's demand. Pet. Supp. Appx. at p. 15. The Ninth Circuit did not reach the District Court rationale because it held there was no jurisdiction, since no effective cancellation was made within the three year period. Pet. Appx. at 10-11.

A. Miguel's Belated – And Still Unpleaded – Damage Claim Cannot Establish Jurisdiction.

Miguel never pleaded a damage claim against BNY premised on a failure to cancel.

Miguel was obliged to plead the basis "upon which the court's jurisdiction depends . . . " Fed. R. Civ. Proc., Rule 8(a)(1). Miguel had the burden of establishing federal jurisdiction. *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375, 377 (1994). The ostensible basis of jurisdiction, her rescission claim under 15 U.S.C. § 1635, has been precluded by the Ninth Circuit in a ruling Miguel does not challenge. Her newfound alternative jurisdictional "hook" – the damage claim – was not pleaded. Because there is no pleading that BNY violated TILA by failing to rescind, Miguel cannot meet her burden of having pleaded facts establishing jurisdiction. Fed. R. Civ. Proc., Rule 8(a).

B. Miguel Sought No Amendment, Which Would Have Been Futile In Any Event.

Miguel never sought leave to file an amended complaint asserting a direct TILA violation by BNY. The District Court was under no obligation to *sua sponte* amend when she first indirectly raised the issue in her opposition to BNY's post trial motion to amend. *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1280 (D.C. Cir. 1994).

Even if leave was sought it could not be granted since this Court has disallowed the creation of jurisdiction by amendment. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 831-32 (1989). While a court can remedy inadequate jurisdictional allegations, it cannot remedy defective jurisdictional facts. The court may not allow, via amendment, the creation of an entirely new jurisdictional basis to provide competence to a court which originally lacked the requisite authority. *Whitmire v. Victus Limited T/A*

Master Design Furniture, 212 F.3d 885, 888 (5th Cir. 2000), *citing, Falise v. American Tobacco Co.*, 241 B.R. 63 (E.D.N.Y. 1999). As stated by the Ninth Circuit: "If jurisdiction is lacking at the outset, the district court has 'no power to do anything with the case except dismiss.' [W]e must examine the []original complaint to determine whether [there was] jurisdiction. If jurisdiction was lacking, then the court's various orders, including that granting leave to amend the complaint, were nullities." *Morongo Band of Mission Indians v. California State Board of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988), *citing*, 15 C. Wright, A. Miller, E. Cooper, *Federal Practice and Procedure* § 3844 (1986). Citations omitted.

Here the original basis of Miguel's jurisdiction has been found to be illusory. Miguel cannot now amend to create entirely new allegations relating to events in 1997 respecting BNY as opposed to events in 1994 respecting Alliance. She may not add "facts" not alleged in the original complaint in an effort to establish jurisdiction, thus creating an entirely new cause of action and a new basis of jurisdiction.

Also, Miguel could not prevail in a motion pursuant to Rule 15, Fed. R. Civ. Proc. Since the one year statute of 15 U.S.C. § 1640(e) expired on November 7, 1998 (i.e. one year after her demand), she would now need to show that her damage claim "relates back". Relating back only occurs if the damage claim "arose out of the conduct, transaction or occurrence set forth . . . in the original pleading." Rule 15(c)(2), Fed. R. Civ. Proc. Her new claim could not "relate back" since it would center on BNY's alleged wrong on November 7, 1997, not to the alleged wrongs of Alliance on December 1, 1994. Indeed, if her claims did arise out of the same conduct alleged in the original complaint, two things

would follow: (1) the one year statute ran on December 1, 1995 and (2) her "tacking" is an impermissible attempt to expand the three-year 15 U.S.C. § 1635(f) statute of repose by an additional year.

C. Miguel's Damage Claims Were Waived Since The District Court's Denial Of That Claim Was Never Challenged.

Miguel never raised with the Ninth Circuit any challenge to the determination of the District Court that her damage claim failed on the merits. Accordingly, she has abandoned that claim. *Castellano v. City of New York*, 142 F.3d 58, 72 (2d Cir. 1998), *cert. denied*, 525 U.S. 820 (1998). ("[Because] appellants failed to raise the [] issue on appeal, they have abandoned it."); *Medical Laboratory Mgmt. Consultants v. Am. Broad Cos.*, 306 F.3d 806, 820 n. 8 (9th Cir. 2002) (party waived claim by failing to present it in the district court or in its opening brief). Jurisdiction cannot be premised on an abandoned claim.

II. THE NINTH CIRCUIT CORRECTLY HELD THAT NEITHER AGENCY PRINCIPLES NOR TILA ALLOW FOR CANCELLATION AGAINST AN ASSIGNEE BY GIVING NOTICE TO A SERVICER.

Miguel argues that general agency principles allow her to give a TILA notice of rescission to Countrywide, the loan servicer, rather than to BNY, the obligee itself. As the Ninth Circuit noted, there is no support for such a proposition and Miguel cited (and still cites) none.

A. TILA Precludes "Substitute" Notice Upon A Servicer When Rescission Is Sought Against The Assignee.

TILA, at 15 U.S.C. § 1635(a), allows for rescission against the creditor "by notifying the creditor in accordance with regulations of the Board, of his intention to do so." "Creditor" is a defined term and refers only to "the person to whom the debt . . . is initially payable on the face of the evidence of indebtedness . . . ." 15 U.S.C. § 1602(f).

TILA also allows for rescission against an assignee of the creditor. 15 U.S.C. § 1641(c). However, TILA does not prescribe how or to whom notice of such rescission is to be effected. Courts have held that TILA rescission against an assignee may be accomplished in two ways: (1) by giving notice to the original creditor; *Shepeard v. Quality Siding & Window Factory, Inc.*, 730 F. Supp. 1295, 1304-06 (D. Del. 1990) (rejecting assignee's claim that it needed notice of rescission separate from the creditor); and (2) by giving notice directly to the assignee. *See, e.g., Stone v. Mehlberg*, 728 F. Supp. 1341 (W. D. Mich. 1989). There are *no* decisions which support the proposition that a cancellation can be effected by mailing a notice to an assignee's purported agent. Such proposition is contrary to settled agency law, particularly, as here, where no proof was proffered as to the scope of the agent's authority to accept such notice.

Miguel's cancel-by-mailing-to-the-servicer theory runs afoul of TILA itself, at 15 U.S.C. § 1641(f). There, Congress provided that the servicer cannot be "treated" as if it were the assignee:

> A servicer of a consumer obligation arising from a consumer credit transaction *shall not be treated as an assignee* of such obligation for purposes of

> this section unless the servicer is or was the owner of the obligation.

15 U.S.C. § 1641(f) (emphasis added). Section 1641(c) gives the consumer a right of rescission against the assignee, but § 1641(f) specifically precludes "treating" the servicer as the assignee. Thus, Miguel is precluded from "treating" the servicer as the assignee in sending her cancellation notice. Congress was clearly aware that servicers play an important role in providing credit but frequently have an attenuated relationship with the entity actually providing the funds. Section 1641(f) precludes a borrower from presuming that the assignee and servicer are one for purposes of TILA.

This interpretation is buttressed by the portions of section 1641(f) which provide that the servicer is required to provide the borrower with the name, address and telephone number of the owner of the obligation. Thus, a consumer has ample opportunity to rescind under the statutory scheme by (1) cancelling with the original obligee (the "creditor") or (2) by learning the identity of the assignee and cancelling directly with it.

B. Miguel Cites No Authority Which Supports The Proposition That A Rescission Notice To The Servicer Can Bind The Assignee.

Miguel mistakenly argues that *Greer v. O'Dell*, 305 F.3d 1297, 1302 (11th Cir. 2002) and *Meyers v. City Corp. Mortgage, Inc.*, 878 F. Supp. 1553, 1558 (M. D. Ala. 1995) stand for the proposition "that for practical purposes 'the servicing agent of the mortgage was the [assignee of the creditor under TILA]'" (Petition at 4) and, thus, that

notification of rescission to the servicer is the same as notification to the assignee.

Had either *Greer* or *Meyers* so held, they would be in conflict with 15 U.S.C. § 1641(f). *See*, *supra*. In fact, neither does. *Greer* dealt with standing and has nothing to do with notice issues; it concerned "whether a loan servicer is a real party in interest with standing to conduct, through licensed counsel, the legal affairs of the investor relating to the debt that it services." *Id.* at 305 F.3d at 1302. In *Greer*, there was an explicit grant of authority to the servicer by the assignee.

Similarly inapposite is *Meyers v. Citicorp Mortgage, Inc.*, 878 F. Supp. 1553 (M.D. Ala. 1995) where Citicorp formally – albeit briefly – became the assignee of a loan before reassigning it. The borrower asserted "assignee" liability against Citicorp under TILA. Citicorp objected, claiming it was not an assignee since it had held the mortgage only for a short time and "promptly reassigned the mortgage." *Id.* at 1558. *Meyers* simply held that "it is clear that Citicorp was at one time, if only for an instant, an assignee of a creditor." *Id.* Neither *Greer* nor *Meyers* support the proposition that a rescission can be accomplished without giving notice to the party against whom rescission is sought.

Kittel v. First Union Mortgage Corporation, 2001 WL 4047942 (W.D. Okla. 2001), *stayed*, 303 F.3d 1193 (10th Cir. 2002), also cited by Miguel, is irrelevant. There is no relationship between the compulsory counterclaim rule implicated in *Kittel* and the notice requirements for rescission here at issue.

III. THE NINTH CIRCUIT WAS NOT BOUND BY "FACTS" ALLEGEDLY FOUND BY THE DISTRICT COURT WHICH WERE UNSUPPORTED BY THE RECORD.

As a second point of error, Miguel argues the Ninth Circuit erred because it "rejected" the District Court's purported "finding" that BNY had knowledge of Miguel's November 7, 1997 cancellation. Miguel variously argues (1) that Circuit Court illegitimately reversed an alleged pre-trial holding of the District Court that BNY "admitted" knowledge of Miguel's claims, (2) BNY "table funded" the loan and was therefore the original obligor under TILA; and (3) BNY "hid" its ownership and should be estopped to claim it is an assignee.

Miguel's scatter-shot fusillade must fail. Her factual assertions are vigorously contested and the lower courts adopted none of these claims. Further, factual issues are peculiarly inappropriate for a petition for certiorari: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings . . . ." Rules of the Supreme Court of the United States, Rule 10.

As a factual matter the alleged determination of the BNY "admission" by the District Court was ambiguous at best, and, if intended to be a determination of the state of BNY's knowledge as of November 7, 1997, was simply wrong and unsupported by the record. The actual record reflects no such admission. BNY did *not* admit – and there was no evidence – that it had any knowledge of Miguel's claimed cancellation prior to the running of the three-year statute. (The District Court language Miguel cites refers to BNY's non-opposition to the assertion that *Countrywide* was sent the cancellation notice on November 7, 1997, as opposed to some later date.)

Miguel's assertions about table-funding are pure smoke. Miguel has cited nothing that could result in a finding that BNY was anything but an assignee.

Finally, Miguel argues that this Court should accept its Petition in order to review the facts and impose an estoppel on BNY. Even if all Miguel asserted were true (and it is not) it would be to no avail. Equitable doctrines like waiver or estoppel cannot vest the courts with jurisdiction they lack. *E.g.*, *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315 (1988).

IV. THIS CASE DOES NOT MEET THIS COURT'S REQUIREMENTS FOR REVIEW.

Normally this Court will consider only cases where there is a conflict between federal courts of appeal or between a federal court of appeal and the court of highest jurisdiction of a state. As evidenced by the authorities cited by Miguel, such is not the case here. No other circuit has ruled on the efficacy of notification to the servicer binding the assignee.

Miguel's second assertion that the Ninth Circuit made an erroneous factual finding when it refused to give credence to alleged District Court factual "findings" is even less worthy of this Court's attention. Parsing allegedly erroneous factual findings is not the function of this Court. Rules of the Supreme Court of the United States, Rule 10.

CONCLUSION

For the foregoing reasons, Respondent, The Bank Of New York, Trustee, respectfully requests that this Court deny Miguel's Petition For Certiorari.

DATED: Honolulu, Hawaii, May 9, 2003.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ESTRELLITA G. MIGUEL, Plaintiff, vs. ALLIANCE BANCORP, a California corporation, THE BANK OF NEW YORK; THE BANK OF NEW YORK Trustee under the Pooling & Servicing Agreement Series 1995 B; INDEPENDENT NATIONAL MORTGAGE CORP. dba INDY MAC and its affiliates and successors; COUNTRYWIDE FUNDING CORPORATION; COUNTRYWIDE HOME LOANS and its assigns; Defendants.	Civil No. 97-01593 DAE 2ND AMENDED COMPLAINT; DEMAND FOR TRUTH IN LENDING ACT RESCISSION; EXHIBITS "A-C"; SUMMONS (Filed June 17, 1998)

2ND AMENDED COMPLAINT: DEMAND FOR TRUTH IN LENDING ACT RESCISSION

I. PRELIMINARY STATEMENT

1. This 2nd Amended Complaint is filed under the Truth in Lending Act and made pursuant to Rule 15(b)

of the Federal Rules of Civil Procedure, to enforce Plaintiff's right to rescind the contract, void Defendant's security interest in Plaintiff's Home, and to recover statutory damages, reasonable attorney's fees and costs by reason of Defendant's violations of the Truth in Lending Act, (hereinafter called TILA) 15 U.S.C. § 1601 et seq., and 12 C.F.R. 226 (hereinafter called Regulation Z).

II. JURISDICTION

2. Jurisdiction is conferred on this Court by 15 U.S.C. § 1640(e) and 28 U.S.C. §§ 1331, 1337.

III. PARTIES

3. The Plaintiff, ESTRELLITA G. MIGUEL, is a natural person, residing at 98-797 Ainanui Loop, Aiea, Hawaii 96701.

4. The Defendant, ALLIANCE BANCORP, the original lender for this subject loan, has a business address at 800 El Camino Real, Millbrae, California 94030.

5. The Defendant, THE BANK OF NEW YORK, is a financial corporation located at 101 Barclay Street, New York, NY 10286.

6. The Defendant, THE BANK OF NEW YORK TRUSTEE under the Pooling and Servicing Agreement Series 1995 B located at 101 Barclay Street, New York, NY 10286, Corp Trust-MBS INC., in the state of NY.

7. The Defendant, COUNTRYWIDE FUNDING CORPORATION conducts its business at 155 North Lake Avenue, Pasadena, CA 91109.

8. The Defendant, COUNTRYWIDE HOME LOANS, has a mailing address at P.O. Box 10222, Van Nuys, CA 91410-0222.

9. The Defendant, INDEPENDENT NATIONAL MORTGAGE CORPORATION, dba as INDY MAC and its assigns or affiliates whose addresses are presently unknown.

IV. FACTUAL ALLEGATIONS

10. On December 1, 1994, Plaintiff entered into a consumer credit transaction with Defendant ALLIANCE BANCORP in which the extended credit was subject to a finance charge and which was initially payable to Defendant ALLIANCE BANCORP.

11. A true and accurate copy of the credit agreement evidencing the transaction is attached hereto, marked ***PLAINTIFF'S EXHIBIT "A"*** and by this reference is incorporated herein.

12. As part of this consumer credit transaction, the Defendant ALLIANCE BANCORP retained a security interest in Plaintiff's principal dwelling located at 98-797 Ainanui Loop, Aiea, Hawaii 96701.

13. A true and accurate copy of that security interest is attached hereto, marked ***PLAINTIFF'S EXHIBIT "B"***, and by this reference is incorporated herein.

14. The mortgage note and mortgage was later assigned to Defendants THE BANK OF NEW YORK, THE BANK OF NEW YORK AS TRUSTEE under the Pooling

and Servicing Agreement Series 1995 B and INDEPENDENT NATIONAL MORTGAGE CORPORATION dba INDYMAC.

V. THE TRUTH IN LENDING VIOLATIONS

15. This consumer credit transaction was subject to the Plaintiff's right of rescission as described by 15 U.S.C. § 1635 and Regulation Z § 226.23(a) which provides in pertinent part:

RIGHT OF RESCISSION

(a) Consumer's right to rescind.

(1) In a credit transaction in which a security interest is or will be retained in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind the transaction, . . .

16. In the course of this consumer credit transaction, Defendant ALLIANCE BANCORP violated the disclosure provisions of TILA and Regulation Z by failing to deliver the required two copies of the notice of the right to rescind. Regulation Z § 226.23(b) provides as follows:

NOTICE OF RIGHT TO RESCIND:

(b) In a transaction subject to rescission, a creditor shall deliver 2 copies of the notice of the right to rescind to each consumer entitled to rescind. The notice shall be on a separate document that identifies the transaction and shall clearly and conspicuously disclose the following:

(1) The retention or acquisition of a security interest in the consumer's principal dwelling.

(2) The consumer's right to rescind the transaction.

(3) How to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's place of business.

(4) The effects of rescission, as described in paragraph (d) of this section.

(5) The date the rescission period expires.

17. In the course of this consumer credit transaction, Defendant ALLIANCE BANCORP failed to deliver all the "material" disclosures required by TILA and Regulation Z, including the following:

a. By failing to properly and accurately disclose the "amount financed," using that term in violation of Regulation Z § 226.18(b) and 15 U.S.C. § 1638(a)(2)(A).

b. By failing to clearly and accurately disclose the "finance charges," using that term, in violation of Regulation Z §§ 226.4 and 226.18(d) and 15 U.S.C. § 1638(a)(3).

c. By failing to clearly and accurately disclose the "annual percentage rate," using that term, in violation of Regulation Z § 226.18(e) and 15 U.S.C. § 1638(a)(4).

d. By failing to properly disclose the number, amounts, and timing of payments scheduled to repay the obligation, in violation of Regulation Z § 226.18(g) and 15 U.S.C. § 1638(a)(5).

18. The Plaintiff has a continuing right to rescind the transaction until the third business day after receiving both the required NOTICE OF THE RIGHT TO CANCEL as described in paragraph 16 and all "material" disclosures as described in paragraph 17, pursuant to 15 U.S.C. § 1635(a) and Regulation Z § 226.23(a)(3).

19. The right of rescission applies not only to the original lender but also to all assignes [sic] of the original mortgage transaction pursuant to TILA 15 U.S.C. § 1635(f) and 15 U.S.C. § 1641(c).

20. On November 7, 1997, Plaintiff sent a notice of cancellation to Defendant COUNTRYWIDE FUNDING CORPORATION, who was later found out to be the servicing agent instead of the assignee of the mortgage. See ***EXHIBIT "C"*** attached hereto and by this reference is incorporated herein.

21. As a result of the aforesaid violations of TILA and Regulation Z, pursuant to 15 U.S.C. § 1635(a) and 1640(a), Defendant ALLIANCE BANCORP and its assigness [sic] are subject to Plaintiff's rescission claims.

WHEREFORE, it is respectfully prayed that this Court:

1. Assume jurisdiction of this case.
2. Rescind the subject December 1, 1994 mortgage loan;
3. Order the termination of the security interest on Plaintiff's home held by the current assignee owner.
4. Order the return to the Plaintiff of any money paid by Plaintiff to anyone, including the original lender and its assignees in connection with this subject December 1, 1994 loan.

5. Enjoin Defendants during the pendency of this action and permanently thereafter, from instituting, prosecuting, or maintaining foreclosure proceedings on Plaintiff's home, from otherwise taking any steps to deprive Plaintiff of ownership and use of Plaintiff's home;

6. Award the Plaintiff costs and a reasonable attorney's fee as provided under 15 U.S.C. § 1649(a), statutory and actual damages.

7. Award such other and further relief as the Court deems just and proper in the premises.

DATED: Honolulu, Hawaii, June 11, 1998

/s/ Estrellita G. Miguel
ESTRELLITA G. MIGUEL
Plaintiff Pro Se